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No. 787

In the Supreme Court of the United States

OCTOBER TERM, 1933

ILLINOIS COMMERCE COMMISSION, ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

APRIL 1934.

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OPINIONS BELOW

No opinion was rendered by the specially-constituted District Court, but on November 3, 1933, its findings of fact and conclusions of law were entered. (R. 1307.) The reports of the Interstate Commerce Commission (R. 33, 137) appear as Docket No. 19610, *Switching Rates in Chicago Switching District*, and are reported in 177 I.C.C. 669 and 195 I.C.C. 89.

JURISDICTION

The final decree of the District Court was entered November 8, 1933. (R. 1316.) Petition for appeal was filed November 16, 1933, and allowed on the same

day. (R. 1332.) The jurisdiction of this court is founded upon the Urgent Deficiencies Act of October 22, 1913, c. 32, 32 Stat. 203, 219, 220 (U.S.C., Title 28, Sec. 47a) and Section 238 of the Judicial Code, as amended by Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U.S.C., Title 28, Sec. 345).

QUESTIONS

Following the establishment of increases in interstate (Illinois-Indiana) switching rates within the Chicago switching district pursuant to authority granted by the Commission in a case also involving the intrastate (Illinois and Indiana) switching rates within said district, but as to which latter the Commission made no specific finding or order in the hope that the State Commissions would bring them into harmony, and following denial by said State Commissions of applications of the carriers for authority to increase their said intrastate switching rates to the same basis, the Interstate Commerce Commission, upon motion of the carriers, reopened the case and, after further hearings, entered an order requiring that the increases be made, to the end of removing the "revenue burden" discrimination shown to be caused by the lower basis, intrastate than interstate, of said carriers' switching rates within the district.

The questions presented are (1) whether the interstate switching rates established by the carriers at the level found reasonable by the Commission in its first report, which finding was reaffirmed in its second report, constituted valid bases of reasonable rates for use by the Commission in reaching its determination

that said carriers' intrastate rates caused unjust discrimination against interstate commerce; (2) whether the Commission's findings of fact were adequate, (3) whether there was substantial evidence in support of said findings, and (4) whether the Commission abused its discretion in denying petition for rehearing based on allegations of changed conditions.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix.

STATEMENT

1. Nature of appeal

This is a direct appeal by the Illinois Commerce Commission, the Public Service Commission of Indiana, and the Acme Steel Company from a final decree (R. 1316) of the District Court for the Northern District of Illinois, sitting as a specially constituted three-judge court, sustaining the validity of the Commission's order of July 3, 1933.

2. The order in question

The Commission's order (R. 168) was issued in exercise of its power (Interstate Commerce Act, sec. 13 (3) and (4)) to remove unjust discrimination against interstate commerce caused by rates imposed by State authority; and it required that the intrastate switching rates of interstate railroads operating in the Chicago switching district, which is partly within Illinois and partly within Indiana, should be not less than the interstate switching rates contemporaneously

applied by said carriers, namely, 3 cents per 100 pounds for 1-line hauls, 3.5 cents for 2-line hauls, and 4 cents for 3-or-more-line hauls,[1] carload minimum 60,000 pounds, applying on an all-commodity basis, except railway equipment on its own wheels. For interstate switching within the district, these rates had theretofore been established by the carriers, effective December 10, 1931 (R. 139), pursuant to the Commission's first report and order in the case, *Switching Rates in Chicago Switching District*, 177 I.C.C. 669 (R. 33). At that time the Commission made no specific finding or order with respect to the intrastate rates in the hope that the Illinois and Indiana Commissions would "bring their rates in harmony with the conclusions herein." Following denial by said Commissions of the carriers' applications for authority to make the increases and following reopening of the interstate case and further hearing, the aforesaid order of July 3, 1933, requiring that the intrastate switching rates be increased to the interstate level, was entered. *Switching Rates in Chicago Switching District*, 195 I.C.C. 89 (R. 137–168c).

The switching rates here involved are for intradistrict switching, that is, for movements originating and terminating within the district. "Intradistrict switching is a complete service in and of itself, having no relation to any road-haul movement. * * * The use of the car in this service, therefore, doubtless is greater than the use in any other class of

[1] Hauls in which several distinct carriers participate.

switching service, involving, as it does, both loaded and empty movements and two complete terminal services." (First Report, R. 48.) "Switching charges differ from line-haul rates in that they are ordinarily not graded in accordance with either the value of the commodity moved or the distance of movement. As a rule they apply to any haul within the switching district no matter how long or how short it may be." (Second Report, R. 163.) More important than distance are the two complete terminal services, the time consumed in rendering the service, and the desirability in the interests of all concerned of a uniform basis. (R. 48, 163.)

The Chicago switching district is divided by the Indiana-Illinois State line, on each side of which "are located industries which ship and receive commodities of the same general nature." The rates which were displaced interstate by the Commission's first order were, with exceptions, rates made on the so-called Lowrey basis of 2.5 cents for 1-line and 2-line hauls and 3 cents for 3 or more line hauls. The Lowrey basis was also applicable intrastate, with exceptions both under and over that basis. "The shippers and receivers of freight within the district generally declared that the basis of rates should be the same throughout the district for interstate and intrastate movements (the measure or level of that basis being the matter of contention) * * * the traffic, both interstate and intrastate, is handled in the same trains, by the same train crews, and in the same manner." (Second Report, R. 157.)

3. History of Chicago switching rates.

The Chicago Switching District limits are set out in Appendix A to the July 21, 1931, report. (R. 76.) The district is about 40 miles long and from 7 to 15 miles wide, densely populated. It is the largest switching district in the country, comprising over 600 square miles, is served by 35 railroads, which maintain within its boundaries a network of more than 5,000 miles of track, serving over 4,000 private industries. (R. 39, 40.) The average length of haul between points in the district is 13.19 miles for one-line hauls, 21.32 miles for two-line hauls, and 26.53 miles for three-line hauls. (R. 43.) Prior to August 1, 1911, the rates, charges, and practices of the carriers covering switching services within the district were in a chaotic condition. Each carrier published tariffs naming rates local to its line and based on its own local conditions. No joint rates were in effect. As these conditions were intolerable, what is known as the Lowrey basis of rates was established. (R. 40.)

The Lowrey basis of rates is described on page 676 of the original report as follows: "During 1910 a joint committee was organized composed of shippers and carriers with the object of establishing some uniformity in the local switching rates. After many conferences various differences were harmonized and an agreement was entered into, since known as the Lowrey agreement, which was translated into an all-commodity tariff, effective August 1, 1911, establishing uniform individual and joint rates on all commodities with a few exceptions, such as coal, coke,

and grain. The exception as to coal and coke was removed in June, 1927. The so-called all-commodity rates published under the Lowrey agreement were 1.5 cents for 1-line and 2-line hauls, and not to exceed 0.5 cent for each additional line haul, minimum 60,000 pounds. Due to the general increases and reduction in rates since 1911 the present all-commodity rates are 2.5 cents for 1-line and 2-line hauls, and 3 cents for 3-or-more line hauls, as compared with the proposed rates of 3, 3.5, and 4 cents, respectively, minimum 60,000 pounds."

4. Proceedings before the Commission

Leading up to the proceeding here involved: In *Jones & Laughlin Steel Corp.* v. *B. & O. R.R. et al.*, 96 I.C.C. 682, decided April 15, 1925, the Commission prescribed a distance scale of rates on iron and steel articles from the Pittsburgh group to St. Louis and to certain destinations in Illinois and Indiana, and found existing rates on the same articles from certain origins in Illinois and Indiana to the same destinations to be unduly preferential. Schedules filed by the defendant carriers to conform their rates in Illinois Freight Association territory with that order were suspended by the Commission for failure, among other things, to realign at the same time the rates on iron and steel articles within the Chicago switching district. This suspension was subsequently vacated, and, at the request of the Commission, the carriers gave consideration to a realignment of said rates. As a result, tariffs were filed naming rates to apply within the district of 3, 5.5 and 6.5

cents, respectively, for one, two and 3 or-more-line hauls. Upon protest, these schedules were suspended in I. & S. Docket No. 2780. (R. 37.)

In the meantime numerous conferences were held between the carriers and shipper representatives with a view to reaching an amicable adjustment of rates on all commodities moving within the district, as a result whereof schedules were filed with the Interstate Commerce Commission and the Illinois and Indiana Commissions naming rates of 3, 3.5, and 4 cents to supersede the effective rates (the Lowrey rates) of 2.5, 2.5 and 3 cents, respectively, for 1-line, 2-line, and 3-or-more line hauls, such rates to apply on all commodities except grain and grain screenings and railway equipment, and excepting livestock via the Baltimore & Ohio Chicago Terminal Railroad; and also naming similar rates to apply between Chicago Heights [2] and points in the district. (R. 37, 38.) These schedules were suspended in I. & S. Docket No. 2900, and in view of the limited record that could be developed in the suspension proceeding, the Commission on its own motion instituted the proceeding, here involved.

> of inquiry and investigation into and concerning the lawfulness of all rates and charges of common carriers by railroad subject to the interstate commerce act for switching within the

[2] Chicago Heights is an industrial center adjacent to the Chicago switching district. (R. 70.) Its manufacturers' association urged that the Chicago switching district boundaries be extended to include it, or that, in any event, the present rate relations be maintained. (R. 40.)

> Chicago Switching District of all carload traffic moving in interstate or foreign commerce, and the relation thereto of the rates and charges for like switching in intrastate commerce, with a view to prescribing such reasonable, proper, nondiscriminatory, nonprejudicial, and otherwise lawful switching rates for said traffic as the facts and circumstances may appear to warrant; * * *. (R. 38)

As heretofore said, applications were pending before the Illinois and Indiana Commissions to increase the so-called Lowrey rates, as applicable intrastate, to the same basis as proposed interstate, and these cases were heard jointly with the interstate investigation, representatives of those State Commissions cooperating "in the supervisory field work entailed as well as in the conduct of the hearings and oral argument." (R. 39, 138, 1312.)

An important part of the evidence considered at the first hearings consisted of a cost study made in response to the request of the Commission for preparation of statistics relating to the shortest, longest, and average hauls within the switching district, to be accompanied by detailed cost data. The study as made was based upon the Coverston-Saur formula and embraced seven trunk lines and eight switching and terminal roads operating in the district. (R. 41.) The Commission said of it that "while the above formula has been the basis of cost studies presented in previous switching cases, its application in these proceedings apparently is the most elaborate and comprehensive to date." (R. 42.)

The required statistics relating to switching hauls were obtained in September, 1926, and were compiled on 42,666 cars which moved during that month in intra-district switching service within the district. The cost data were obtained by a joint cost study collaborated in by the fifteen roads, aforesaid. Under the plan of the study, the expenses incurred were segrated into three general classes, namely, clerical, switching and car detention or maintenance. Taxes and returns on investment were provided for by use of an estimated operating ratio, applied as a divisor to expand the determined costs so as to embrace those elements. The study was extended to each one of the 69 commodity classes for one, two, and three-line hauls segragated between interstate, intrastate Illinois, and intrastate Indiana. The test periods within which the unit costs were determined were for one week on each of the fifteen roads during June, August, and October, 1927. The unit costs so determined were then applied to 26,166 cars, or 61.33 percent of those embraced in the traffic analysis as of September, 1926, this number having moved wholly over the study roads during that month. These cars were called study cars to distinguish them from cars not included in the study, which were designated as non-study cars. (First Report, R. 41–42.) Applying an operating ratio of 66.67 percent, provided for in the Coverston-Saur formula, the study showed the average cost of switching to be 2.8 cents per hundred pounds for one-line hauls, 3.4 cents for two-line hauls

and 3.8 cents for three-line hauls. (Second Report, R. 43.)

The exactness of the cost figures under the formula used were questioned both by the carriers and by the shippers, the carriers claiming that the costs were understated in various important particulars, and the shippers asserting on various grounds that they were overstated. These criticisms are discussed and analyzed at length in the Commission's first report. (R. 44–51.)

In a table set forth in said report (R. 52) it was shown that, giving effect to the extensive movements on exceptions over and under the standard Lowrey basis of rates, the weighted average revenue was 2.1, 2.6, and 3.5 cents as compared with said Lowrey basis of 2.5, 2.5, and 3 cents for one, two and three-line hauls; and that, giving effect to exceptions under and over the new proposed Lowrey basis, the weighted average revenue would have been 2.5, 3.6, and 4.2 cents as compared with proposed Lowrey basis of 3, 3.5, and 4 cents. Commenting on this showing, the report calls attention to the fact that, when all the traffic is considered, the amounts of increase on the one-line and three-line hauls are less than indicated by the proposed changes in the Lowrey rates and that, while both interstate and intrastate traffic contribute to the deficiency, the principal factor is the large amount of tonnage that moves and would continue to move in 1-line hauls intrastate in Illinois on exceptions under the Lowrey basis. (R. 53.)

In a further table set forth in the report (R. 54), also taking into account the exceptions from the Lowrey rates, it was shown that the ratio of operating expense to weighted average revenues, under existing rates was, for 1-line hauls, 93.14 percent, for 2-line hauls, 92.83 percent and for 3-line hauls 86.51 percent; and that, under the proposed rates, said operating ratio was for 1-line hauls, 77.55 percent, for 2-line hauls 63.77 percent and for 3-line hauls 65.62 percent. Thereafter the report reads:

> It is quite evident from the high ratio of operating expenses to the revenues that the present rates are too low. The record contains no suggestions of operating ratios that approach as high as 86.51 percent, which is the lowest ratio indicated above at the present rates. The highest ratios suggested by the shippers range from 72.20 to 76.80 percent, and the highest suggested by the carriers is 66.67 percent. * * * (R. 54.)

Concerning what might be a proper operating ratio, the Commission, after further discussion which will be later developed, stated that the question resolved itself largely into a matter of opinion.

In addition to the cost study and as confirming that the proposed rates were fully justified, the Commission applied additional tests. After mentioning that the hauls involved range from a minimum of 0.1 mile to a maximum of 61.1 miles and that the average hauls are 10.8 miles for 1 line, 21.6 miles for 2-line, 24.5 miles for 3-line, and 18 miles for 1-, 2-, and 3-line hauls combined, it said that these hauls are of such

great average lengths as to suggest that they are in effect line-hauls, and except for the fact that they are performed wholly within a district of such unusual size as the Chicago switching district, they would be subject to the usual line-haul rates for such distances. The Commission then cited cases in which it had prescribed rates for line hauls on low grade commodities, mentioning among others the *Southwestern Brick Cases*, 107 I.C.C. 681, in which a distance scale on brick and related articles was prescribed, the single-line scale commencing with a rate of 4.5 cents for hauls of 10 miles and under with 1 cent added for joint-line haul. The report also mentions *Iron and Steel Investigation*, 155 I.C.C. 517, in which a scale of rates was prescribed throughout official territory on iron and steel articles which commenced with 6 cents for 5 miles and under, and for the 15- to 20-mile block, representing the average hauls within the Chicago district, a rate of 8 cents (Later voluntarily lowered to 5.25 cents. See second report (R. 147) and page 38 this brief) was prescribed. The report then reads:

> This, and numerous other similar comparisons which could be shown, covering rates prescribed on various low-grade commodities for short hauls, indicates that the rates under suspension are considerably lower than the rates prescribed by us for similar distances in line haul movements. (R. 70.)

The Commission's findings in its first report, insofar as they need be set forth here, read:

> The ascertainment of the cost of performing a particular service is always beset with

serious difficulties, and this is particularly true in connection with switching costs within an area as congested as the Chicago switching district, which presents a complicated network of rail lines probably not equaled in any other section of the country. The cost study presented herein is perhaps more exhaustive than any heretofore undertaken in any proceeding involving switching charges. Considering these facts and the further fact that all of the parties, both shippers and carriers, were practically unanimous in contending for the establishment of an all-commodity basis to apply throughout the Chicago switching district, it appears that the rates proposed for the one-, two- and three-or-more-line movements are not excessive. We find:

(a) That the rates proposed of 3 cents per 100 pounds for 1-line hauls, 3.5 cents for 2-line hauls, and 4 cents for 3-or-more line hauls, carload minimum 60,000 pounds, within the Chicago switching district as defined in Appendix A, will not be unreasonable for the future for application on all of the commodities switched within the district, except railway equipment on its own wheels. * * *. (R. 75–76.)

The Commission's order, dated July 31, 1931, prescribed maximum rates as specified in the above findings, which were established as of December 10, 1931, and have since been in effect for interstate switching within the Chicago switching district. (R. 83.)

On the question of the relation of the intrastate switching charges involved, the Commission said in its first report:

> A large percentage of the traffic under consideration is intrastate in character, but the record does not disclose any difference in the conditions surrounding the handling of the interstate and intrastate movements. In the hope that both the Illinois Commerce Commission and the Public Service Commission of Indiana will bring their rates in harmony with the conclusions herein, no specific finding or order with regard to intrastate rates will be entered at this time. (R. 75.)

Applications by the carriers for authority to establish increased rates for intrastate switching equal to those made effective for interstate switching within the district were denied by the Illinois and Indiana Commissions. (R. 335, 414.) Thereafter, the carriers petitioned the Interstate Commerce Commission for an order for the establishment of said rates on the record as already made in the case. The Commission denied this petition (R. 9–10) but, upon appropriate motion by the carriers, reopened the proceeding for further hearing to determine—

> Whether the adjustment of the interstate and intrastate rates and charges is unduly prejudicial to interstate shippers and traffic and unjustly preferential of intrastate shippers and traffic, or unjustly discriminatory against interstate commerce, in violation of Section 13 of the Interstate Commerce Act. * * *. (R. 139.)

On December 23, 1931, complaint was filed, Docket 24950, by the Acme Steel Company and other shippers and receivers of freight between points within the Chicago switching district, complaining that the interstate rates which became effective on December 10, 1931, were unjust and unreasonable. The carriers moved for the dismissal of this complaint without a hearing. That motion was denied and the two cases, the reopened Docket 19610 and the formal Docket 24950, were set for hearing. While the records in the two cases were separately kept, it was stipulated that any material or relevant testimony of record in the one case should be considered as part of the record in the other case. (R. 139.)

At the hearing in the complaint case, the attack on the reasonableness of the interstate switching rates was based generally on two grounds, namely, that the cost study should have been made on all 35 railroads operating in the district and that the record had become stale. While the shippers asserted that the cost study was not representative because all roads were not used the only specific criticisms of the selection made were directed to the inclusion of the Elgin, Joliet & Eastern and exclusion of the Chicago Junction Railway. As to the former, the Commission had said in its first report that "the record does not indicate that the inclusion of the E. J. & E. has inflated the unit costs, and in fact one of the exhibits filed by the shippers indicates that the engine hour costs are lower with that carrier

included than if it is excluded." (R. 54.) The shippers' exhibit referred to is Exhibit 13. As to the omission of the Chicago Junction, it does not seem that that road could well have been included "due to the volume of 1-line short-haul undiversified traffic handled between packing houses on its line. Its movements range from 200 feet to a mile. It is obvious that those movements are not representative of the intra-district hauls performed within the district." (Second report, R. 158–159.)[3] Concerning the allegations that the record had become stale since the interstate rates had been prescribed and established within the switching district, the principal changed conditions specified by the complainants were (1) falling off in volume of traffic, (2) increased truck competition, (3) decline in value of commodities transported, (4) reduced wages and cost of supplies, and (5) curtailment in amount of service rendered by the carriers to the industries within the district. (R. 95.)

[3] Appellants' brief in this Court (p. 81) states: "It was urged in the court below that the cost study of record required the expenditure of about $250,000 and as one ground for not having a new and a representative cost study that the additional cost would have been $1,000,000. The fact that an accurate and correct cost study might be extremely expensive is no justification for the use of a less expensive cost study which does not reflect current facts." As judged by the reports of the Commission, its refusal to demand of the carriers the new and additional cost studies was governed by the lack of merit in appellants' objections to the representative study and the fact that the effect of changed conditions on the rates could be considered without need for the further detailed studies specified as necessary by appellants.

All these matters were given consideration by the Commission. The defendant carriers' position in the complaint case was that the only issue involved was whether the interstate rates established in conformity with the Commission's order violated section 1 and that they were warranted in relying upon the findings of reasonableness in the first report, the complaint having been filed but 13 days after the effective date of the rates. They contended that the decrease in tonnage had increased their unit costs and submitted exhibits as to the eight switching roads showing that total operating expenses per car had increased from 3.86 in 1928 to $4.04 in 1931. (Second report, R. 97–98.) Tax accruals were 48 cents in 1928 and 61 cents in 1931, and their operating ratio increased from 66.97 percent to 74.11 percent. (R. 949–950; exhibit 107.) Similar information concerning the trunk lines used in original cost study is shown in exhibit 108. Their operating ratio increased from 73.8 percent in 1928 to 78.45 percent in 1931. (R. 950.)

The Commission's second report, among other things, refers to the comparison made in its first report with distance scales prescribed for line-haul movements in various cases, including *Iron and Steel Articles*, 155 I.C.C. 517. (R. 98, 99.) It discusses complainants' exhibits with respect to other line-haul rates. (R. 99.) The report states that the fifth-class rate prescribed in eastern class-rate revision, is 11 cents for 5 miles and 12 cents for 20 miles, and the sixth-class rate is 8 cents for 5 miles and 9 cents for 20

miles. It further mentions testimony of various operating officials and of a witness for the Inland Steel Company to the effect that the handling of the switching traffic is comparable to road-haul operations. Answering complainants' objection to such comparison, made apparently on the assumption that the cost of performing switching service is less than the cost involved in line-haul movements, the Commission cites *Stielow Bros. Co.* v. *C. & N. W. Ry. Co.*, 52 I.C.C. 339, wherein it was recognized that a switching service, especially where congestion prevails, is more expensive than a road haul for a like distance. (R. 148–149.)

With respect to the question of minimum carload weight, the report reads "the evidence discloses that the traffic generally loads to and in excess of 60,000 pounds, and the record does not establish that the 60,000-pound minimum is unreasonable. (R. 155–156.) The ultimate finding in the complaint case reads:

> We find that the assailed interstate switching rate of 3 cents per 100 pounds for 1-line hauls, 3.5 cents for 2-line hauls, and 4 cents for 3-or-more-line hauls, and the carload minimum weight of 60,000 pounds, applicable within the Chicago switching district and between the district and Chicago Heights, Ill., are not unjust or unreasonable. The complaint accordingly will be dismissed. (R. 156.)

The report's discussion in respect of the unjust discrimination caused by the lower intrastate switching rates follows the above finding affirming the inter-

state level. It is recited that the proceedings embrace all of the 69 commodity groupings into which the freight traffic has been classified; that in each of the groups are involved both interstate and intrastate movements; that much of the intrastate traffic moves on the so-called Lowrey basis, the same rate and minimum weight applying to each commodity irrespective of difference in the length of haul; that the shippers and receivers of freight generally declared that the basis of rates should be the same throughout the district for interstate and intrastate movements; and that "The evidence discloses that the traffic, both interstate and intrastate, is handled in the same trains, by the same train crews and in the same manner." (R. 156–157.) The report further states that many of the 35 railroads operating within the district cannot move traffic from an industry on the Indiana side to an Indiana destination without crossing the State line, and, likewise, must cross the State line in a movement from Illinois industries to destinations in that State; that some of the activities are located on both sides of the State line, and that some of the assembly yards and interchange tracks overlap State lines. (R. 159.) It is further stated (R. 160–162), that while many industries within the district can ship to points within its boundaries only over interstate routes and must, therefore, pay the rates found reasonable for interstate movements, many other industries have intrastate routes, and because of the refusal of the State Commissions to raise the intrastate rates, are enabled to resort to unnatural

circuitous and expensive routes against the flow of the traffic in order to obtain the lower intrastate rates. The failure of any interstate shipper to show injury resulting from the higher interstate rates was explained by the Commission as follows:

> * * * But the record strongly suggests that the failure of any interstate shippers or manufacturers to testify in the proceeding may be accounted for in large part by the fact that most of them, having intrastate routes available, now have the benefit of the lower intrastate rates, and in part was actuated by the hope and belief that their failure to present the necessary specific evidence of competition with intrastate traffic and shippers would ultimately result in the restoration of the prior existing rates for interstate movements. (R. 160.)

A table set forth in the report (R. 162) and discussion following shows that the maintenance of the lower intrastate than interstate rate basis had resulted in a substantial increase in intrastate hauls and corresponding decrease in interstate hauls, with commensurate revenue loss (see also Exh. 7–A). The report sets forth the carriers' estimates of revenue loss due to the maintenance of the lower intrastate rates. Based on traffic conditions prior to the business depression, and asserted as representing normal conditions, this loss is shown as $2,864,957 annually. Further estimates (representative of present conditions) based on traffic and revenue studies for periods prior and subsequent to the increase in the interstate

rates show a constructive annual loss of $1,057,521 resulting from the lower intrastate rates. (R. 164.) The Commission stated that, in those figures, the carriers relied on the assumption that all the traffic would continue to move at the higher rates, which was not a fair assumption. However, following full discussion of conditions in the district, including motor and water carrier competition, the Commission said:

> * * * we are not convinced that any substantial proportion of the traffic now moving by rail intrastate will be diverted to other forms of transportation if the rates found reasonable for interstate traffic are applied thereto. (R. 165.)

The Commission's findings, as pertinent here were:

> While the evidence shows that the existing competition by motor truck is material, and indicates that this means of transportation will be utilized to a greater extent if the intrastate rates are increased, and that therefore, some additional tonnage in all probability will be lost to trucks, or diverted to barge and pipeline movement, the record nevertheless is convincing that the carriers will derive a substantial increase in revenue if the intrastate rates are increased to the interstate basis, and we so find.
>
> We further find that the transportation conditions throughout the Chicago switching district are substantially similar; that they are not more favorable for intrastate movements than for interstate movements between the switching district and Chicago Heights; that the

maintenance of intrastate switching rates and carload minimum weights in Illinois and Indiana between points within the Chicago switching district for 1-line, 2-line, and 3-or-more-line movements, and between that district and Chicago Heights on a lower basis than the corresponding all-commodity rates and minimum weights for 1-line, 2-line, and 3-or-more-line movements, found not unreasonable and approved for interstate transportation in switching service, has not been shown to have caused or to cause any undue preference and advantage of persons or localities in intrastate commerce, or any undue prejudice and disadvantage to persons or localities in interstate commerce, but that the maintenance of such lower intrastate rates results, and will for the future result in unjust discrimination against interstate commerce. (R. 166.)

The order of July 3, 1933 (R. 168a) was thereupon entered.

5. Proceedings in Court below

The bill of complaint to enjoin and set aside the order was filed October 5, 1933, by the Illinois and Indiana Commissions, the Board of Trade of the City of Chicago and the Acme Steel Company. (R. 1.) The United States and a number of railroads were named defendants, and the Commission intervened as a defendant. (R. 438.) The case was submitted to the court upon the pleadings, the reports and orders of the Commission of July 31, 1931, and July 3, 1933, and a certified copy of the testimony and exhibits which were before the Commission

in the latter case. November 3, 1933, the court adopted findings of fact and conclusions of law, which sustained the Commission's order in all respects, denied a permanent injunction and ordered the bill dismissed. (R. 1306.) November 8, 1933, the final decree, dismissing the bill of complaint, was entered. (R. 1316.) In its findings the lower court held that the order was supported by sufficient evidence, was definite and certain, contained adequate findings of fact and was within the power and authority of the Commission. It also adopted as a conclusion of law that there had been no abuse of discretion on the part of the Commission and denied complainants' various motions, including one for reopening and further hearing. (R. 1315.) An application for a stay pending appeal was denied by the lower court. (R. 1331.)

SUMMARY OF ARGUMENT

1. The interstate rates for switching within the Chicago district, as found reasonable in the Commission's first report, as established in the carriers' tariffs, effective December 10, 1931, as reconsidered in the light of changed conditions brought to the Commission's attention at the further hearings, and as reaffirmed in its second report constituted a valid basis of reasonable rates for use by the Commission in reaching its determination that the lower rates for intrastate switching within the district subjected interstate commerce to unjust discrimination. At the first hearing representatives of appellant State Commissions cooperated in the supervisory field

work entailed, as well as in the conduct of the hearings and the oral argument" which cooperation was "of substantial aid in the development of the record." (R. 39.) Appellants were parties to the further hearings. Everything asked of the Commission was done except that it denied motions of appellants asking that it demand of the carriers for submission at the further hearings the preparation of new and additional cost studies particularized by appellants. The Commission could reconsider the rates in light of changed conditions without need for the new cost studies specified by appellants. It did so, and after consideration of all matter brought to its attention, reaffirmed the rates as not unreasonable.

2. The Commission's order requiring that the intrastate switching rates within the Chicago switching district be increased to the level of the interstate rates theretofore prescribed and established, was one for removal of unjust discrimination against interstate commerce in the sense of "preventing the depletion of interstate revenues by discriminating intrastate rates." *New England Divisions Case*, 261 U.S. 184, footnote, page 190. Furthermore, the Commission's action in ordering said State rates to be increased, as well as its theretofore action authorizing the interstate increases, was in performance of the affirmative duty imposed on it by Transportation Act, 1920, "to fix rates and take other important steps to maintain an adequate railway service" for the country. *Wisconsin R.R. Com.* v. *C., B. & Q. R.R.*, 257 U.S. 563, 585; *Florida* v. *United States*, decided April 2, 1934.

3. The Commission's findings in support of its order as one to remove a "revenue burden" discrimination were adequate and complete. The Commission reviewed the evidence of the carriers showing revenue losses in very large amounts resulting from the lower State rates, and set forth the same in its report. Because of competition from other forms of transportation it did not consider that it was a "fair assumption" that the same volume of traffic theretofore moving would continue to move after increase in the State rates, but following review and discussion of the evidence relating to competitive forms of transportation, it said that it was "not convinced that any substantial proportion of the traffic now moving by rail intrastate will be diverted to other forms of transportation if the rates found reasonable for interstate traffic are applied thereto" (R. 165); and it found that while such competition is material and some additional tonnage will in all probability be lost "the record is nevertheless convincing that the carriers will derive a substantial increase in revenue if the intrastate rates are increased to the interstate basis." (R. 166.) In short, the Commission's findings leave no doubt of its conviction that the increased rates would produce such substantial additional revenue. Findings of impracticable exactness are not expected of the Commission.

4. The Commission's findings and order were supported by a very full record. Discrimination was shown not only to result in large losses in revenue, but also to result in wasteful transportation service in that shippers, to avail themselves of the lower in-

trastate rates, routed their shipments over circuitous lines against the flow of the traffic. It was shown that transportation conditions, state and interstate, were substantially the same. Shippers and carriers were practically unanimous in declaring that one basis of rates should apply both interstate and intrastate. The first hearings showed that the traffic was of great importance to the carriers, that carrier competition had resulted in a chaotic rate structure, and that the general revision of rates there undertaken was for the purpose of putting an end to the burdens imposed by this situation. At the second hearing figures were given by important carriers showing for a representative period the differences between revenues actually accruing to them under the intrastate rates, and those that would have accrued if the state rates had been on the interstate basis. Tonnage figures were supplied showing the amount of traffic moving intrastate and interstate during said period.

5. The denial by the Commission of appellants' motions that it demand of the carriers a new and additional cost study was not an abuse of discretion. The weight to be accorded evidence is for the Commission. Nor was there any error in the Commission denying a petition for reopening and further hearing. Evidence as to the alleged changed conditions was in the record, was considered by the Commission, and is fully discussed in its report. The denial by the Commission of a petition, the granting of which would disenable the Commission from performing its important duties, is not an abuse of discretion. *United States* v. *Northern Pac. Ry. Co.*, 288 U.S. 490, 494.

ARGUMENT

I

The basis of interstate rates, established by the carriers pursuant to the Commission's findings following the first hearing and reaffirmed as reasonable at the second hearing, constituted a valid basis of reasonable rates for use in determining that the lower intrastate rates were unjustly discriminatory and burdensome; and the Commission's refusal to demand of the carriers at the second hearing the new and additional cost studies particularized by appellants was not an abuse of discretion invalidating its determination and order

Where, in determining whether the State rates of interstate carriers subject interstate commerce to unjust discrimination or "revenue burden", the interstate rates of the carriers are used as the measure, it is of course true that such measure must be that of reasonable rates. *Georgia Comm.* v. *United States*, 283 U.S. 765. In the present case the Commission, following the first hearings, prescribed the interstate rates as reasonable, and they were established by the carriers December 10, 1931, and have since been applied on interstate switching within the district. Following refusal of the State Commissions to allow increase to the same level of the rates on intrastate switching the carriers asked the Interstate Commission to order that the increase be made on the record as it stood. In line with its procedure in the *Georgia Commission Case*, *supra*, however, the Commission denied that application and reopened the case for further hearing on the question of unjust discrimination caused by the lower basis of the intrastate

switching rates within the district. Thereupon appellant State Commissions and shippers filed motions for a new cost study on all 35 railroads on grounds, in substance, that the old study as made with respect to the 15 roads was not representative, that it was defective in other enumerated particulars, and that conditions had changed since it was made. These motions were denied. Thirteen days after the interstate switching rates had been established by the carriers pursuant to the Commission's finding and order, appellants Acme Steel Company and 57 other shippers, filed with the Commission complaint against those interstate switching rates. This was heard separately from the main case but upon stipulation that pertinent evidence in the one case could be considered in the other and the two cases were dealt with in the one report. The question of the reasonableness of the interstate rates, although recently passed upon, was again considered with the utmost care and the prior findings reaffirmed.

The above being the circumstances under which the interstate rates were established and were reaffirmed as reasonable as they stood established in the carriers' tariffs, the question is as to their status as a valid basis or measure for use by the Commission in reaching its determination that the lower basis of intrastate rates was unjustly discriminatory and unduly burdensome upon the carriers' revenues and interstate commerce. In the Commission's second report involved in the *Georgia Commission Case, supra,*

(160 I.C.C. 309), in answer to the contention that it should have been reopened as to the reasonableness of interstate rates as well as to the issue of unjust discrimination caused by the lower State rates, it was said at page 313:

> As heretofore stated, the 17,517 scales were recently prescribed in these proceedings for interstate application after an exhaustive investigation and are now applied on interstate traffic throughout the greater part of southern territory. The only reason that no findings were made for the future or order entered in the original proceedings concerning the Georgia intrastate rates was because this commission, desirous of fostering and encouraging the spirit of cooperation between it and the State commissions, "felt that the Georgia commission will cooperate in authorizing such revisions as may be necessary to bring their rates into harmony with the interstate adjustment herein approved." The Georgia commission has authorized a revision. Respondents and others complained and are here contending that this intrastate revision is so out of harmony with the approved interstate revision that it has brought about an unlawful relationship. For the purpose of determining whether or not this is the fact, the proceedings were reopened and the further hearing had. The scope of the further hearing was properly limited to the question indicated. If the contention made on behalf of the Georgia Commission in this regard were sound, then our efforts to secure cooperative action in

situations such as here presented instead of bringing about that result, could be made the instrument of burdening this commission with endless investigations covering the same subject matter and would result in litigation being prolonged indefinitely. The contention is without merit.

In disposing of this same contention, the Supreme Court in the *Georgia Commission Case, supra,* said at pages 769–770:

> * * The claim is that there was no "full hearing" before entry of the challenged order, because the Commission limited the supplemental hearing to the question of prejudice and discrimination, and refused to consider anew the question of the reasonableness of the interstate scales. It is true that when state rates are assailed on the ground that they result in undue prejudice to interstate shippers or discriminate against interstate commerce, the Commission must determine whether the existing interstate rates are reasonable, as it may not require intrastate rates to be raised above a reasonable level. *State Corporation Comm.* v. *Aberdeen & Rockfish R. Co.*, 136 I.C.C. 173, 180. But the reasonableness of the interstate rates had already been found when they were established in the earlier stage of the proceedings; and at those hearings the Georgia Commission and the Highway Board were represented. Nearly eighteen months had elapsed since the original order, but no evidence was offered at the supplemental hearing to show that conditions had so changed since the interstate

rates were prescribed as to require reconsideration of the issue. The appellant's objection to the procedure is unfounded.

In the present case the Commission did more than in the *Georgia Case* in that it reviewed and reaffirmed the reasonableness of the interstate rates. Appellants contend, however (Br. 72–82), that the Commission's denial of their motion for a new cost study was an abuse of discretion, asserting that the 15 roads used were not representative, that the study was defective in other respects, and that conditions had changed since it was made. It will be noted that the abuse of discretion with which the Commission is charged, is not that it denied hearing as to the effect of changed conditions on the reasonableness of the rates (Compare *A. T. & S. F. Ry.* v. *U.S.* (*The Grain Case*), 284 U.S. 248), but is that it denied motions asking that those changed conditions be tested in the manner insisted upon by appellants, namely, by a new cost study made with respect to "each and every" of the 35 railroads within the district and in other particulars as specified by appellants. (B. 73.)

Giving consideration first to appellants' contention that the 15 roads used in the cost study were not representative of conditions generally, their motion made to the Commission (shown as an appendix to Appellants' Brief, pages 183–199) states, at pages 186–187, that the Commission, in requesting the carriers to make the study, specifically directed that the car movements should be representiatve of the

traffic and, in order that the expense should not be prohibitive suggested the selection of yards of a limited number of carriers in which are performed car movements which are representative of those to which the rates apply; that, in response thereto, the carriers selected 8 roads (named in the motion); that after further conferences the Commission gave notice that the 8 roads were not sufficiently representative of the entire movement and a further study was made by 7 other roads (named in the motion) all of which were embraced in a list which the shippers had insisted were necessary to add to the original 8 roads in order that the study be representative; that in addition to the seven which were added the shippers had requested the inclusion of the Chicago River & Indiana (including the Chicago Junction); that this request was presented by the Commission to the carriers but the latter declined to include any movements of the Chicago Junction; and that at the hearings the carriers were advised by the Commission that the responsibility for a representative cost study rested with them and that they assumed the risk of not having such representative study.

From the Commission's two reports it is plain that the carriers lived up to the responsibility of selecting representative study roads and that they were accepted as such by the Commission. And, so far as appears from said motion appellants' only objection to the "make-up" of the study roads (except that all 35 were not included) resolves itself into the criticism that, while the carriers did add to the 8 study roads

first selected, 7 others requested by appellants, they refused to add also the Chicago Junction. This criticism of exclusion of the Chicago Junction plus the one further criticism of the inclusion of the Elgin, Joliet & Eastern is all, too, that appears from the Commission's reports as objections urged by appellants against the make-up of the study roads. Earlier in this brief we referred to the statement in the Commission's first report that "the record does not indicate that the inclusion of the E. J. & E. has inflated the unit costs, and in fact one of the exhibits filed by the shippers (Ex. 13) indicates that the engine-hour costs are lower with that carrier included than if it is excluded." (R. 54.) As to the exclusion from the cost study of the Chicago Junction the Commission said in its second report that this was "due to the volume of 1-line short-haul undiversified traffic handled between packing houses on its line. Its movements range from 200 feet to a mile. It is obvious that those movements are not representative of the intradistrict hauls performed within the district." (R. 158–159).[4]

In short, there was no merit to appellants' sole criticisms of the study roads as constituted. The rejection of the Chicago Junction was approved by the Commission on grounds which, on the face of things, were sound. Inclusion of the E. J. & E. did not inflate the costs but had the contrary effect. As for appellants' assertion that, in order to be repre-

[4] The Commission's first report found also that the Chicago Junction had no place in the cost study. (R. 61.)

sentative, the study had to be conducted by each and every one of the roads in the district, the Commission from the beginning was not of that view.

It should be kept in mind that appellants' motion was not simply for reopening to test the reasonableness of the rates in light of changed conditions, but was for the Commission to demand of the carriers a new cost study to be made on all 35 roads and in a particular manner (Appellants' Br., 198). The charge against the Commission of abuse of discretion is because of its refusal to make that demand.

The complaint of Acme Steel Company and 57 other shippers against the interstate rates, disposed of as aforesaid with the main case, enabled the Commission to further consider the interstate rates. New and detailed cost studies were not necessary in order to reconsider the reasonableness of the rates prescribed in the first report, and this is perhaps best shown by the changed conditions urged by appellants at the second hearing. The Commission's second report reads (R. 143):

> Some of the changed conditions enumerated since the prior record was closed are (1) falling off in volume of traffic, (2) improvement of the highways in the district resulting in the diversion of much additional tonnage from the rail lines for movement by truck, (3) the decline in value of many of the articles or commodities transported, (4) reduction in wages and cost of supplies, and (5) curtailment in the amount of service rendered by the carriers to the industries within the district.

These matters could be considered in connection with the record already made without need for new and detailed cost studies. And the Commission's second report shows that such new conditions were considered and weighed. The record disclosed that some of the commodity prices were on a lower level and that there had been a falling off in tonnage. The conditions with respect to truck competition were fully discussed and will be referred to later in this brief.

The carriers contended that the principal change in conditions was the decrease in volume of traffic due to the general business depression; that such decrease in tonnage had increased their unit cost because not accompanied by a corresponding or proportionate decrease in operating expenses. In support of this they introduced exhibits [5] from which the Commission compiled a table, set forth in its second report (R. 146), which showed increases in items of unit cost of handling cars for the 8 switching roads included in the cost study. Among other things, the total per-car cost is shown to have increased from $3.86 in 1928 to $4.04 in 1931. The operating ratio of 66.97 percent in 1928 is contrasted with that of 74.11 percent in 1931. The carriers' exhibits further show that total operating revenues for the same switching roads, but including the Chicago River & Indiana Railroad, were for the year 1931 about $10,500,000 less than for the year 1928, whereas total operating expenses of 1931 were only $5,500,000 less than in 1928. The trunk

[5] R. 949–950; Exhibits 107, 108, 109.

lines used in the cost study introduced similar evidence, although not segregated as in the case of the switching lines. Their figures showed, among other things, that their operating ratio had increased from 73.8 percent in 1928 to 78.45 percent in 1931. (R. 950.)

The purpose of these exhibits was to demonstrate, as aforesaid, that the decrease in volume of traffic unaccompanied by a proportionate decrease in operating expenses had caused unit costs to increase rather than to diminish. (R. 145.) In short, new cost studies would have shown higher unit costs.

The shippers contended that switching rates in various other switching districts were on a lower basis. In this connection it is important to keep in mind that everything entering into switching rates is a matter of averages; so that the rates of a district whose area, average hauls, average costs are a quarter, or less, of those of the Chicago district are in no way comparable to the rates of the latter. Concerning the districts mentioned, the Commission said:

> Certainly not any of the compared districts approach the magnitude of the Chicago district, which is approximately 40 miles in length and from 7 to 15 miles wide, comprising over 600 square miles. This area contrasted, for example, with the Pittsburgh switching district in which the maximum haul does not exceed 10 miles, may not fairly be said to be a comparable district. Nor is any reference made to the relative property values per mile of road in Chicago as contrasted, for

example, with the Toledo, Erie, and other switching districts referred to.

In brief, the Chicago district is unique, and insofar as rate comparisons in substantiation of the cost study are concerned, the Commission was necessarily right in looking not to the rates of other districts but to line-haul rates. Officials of the different carriers in charge of switching movements in Chicago testified that the operation of switching trains is comparable to road-haul operation; that the business is handled in regular transfer trains consisting of cars for both interstate and intrastate movements, operated under full crews with the air coupled up and supplied with cabooses and both road-haul and switching business is handled in the same trains. (R. 148.)[6]

Similarly as in its first report the Commission, in its second report, compared the switching rates with distance scales on low grade commodities. In *Iron & Steel Articles*, 155 I.C.C. 517 (official territory) the rate for the 15 to 20 mile block, the average haul within the district, is 5.25 cents. In *Atlas Cement Co. v. C. B. & Q. R.R.*, 81 I.C.C. 1, the rate on cement for 20 miles is 7 cents. The fifth class rate in the eastern class rate revision is 11 cents for 5 miles and 12 cents for 20 miles and the sixth class rate is 8 cents for 5 miles and 9 cents for 20 miles. (R. 98–100.) These scales and others on low grade commodities are referred to in the testimony.[7] Naturally they were not

[6] Witness Shreve R. 956–965; Jacoby R. 965; Barlow R. 986; Meyers R. 996; Whiting R. 1001.

[7] Witness Bond R. 1162–1164; 1167; 1169–1170.

used by the Commission to fix the switching rates with precision, but they are convincing as showing that the rates of 3, 3.5 and 4 cents for 1-line, 2-line, and 3-or-more line hauls, which were proposed after conferences between carriers and shippers (See first report, R. 37), which were shown warranted by the cost study and which were found reasonable in the Commission's first report and thereafter established in the tariffs, are well within the bounds of reasonable maximum rates.

Said interstate rates are not under direct attack in this suit, which is one for the setting aside of an order requiring the intrastate rates to be raised to the interstate level. As aforesaid, the issue with respect to the interstate rates is as to their validity as a basis for use by the Commission in reaching its determination that the lower intrastate rates unjustly discriminated against interstate commerce. Having been prescribed by the Commission, said interstate rates stood established in the carriers' tariffs as reasonable rates which the Commission might have used for such purpose without need for reconsideration and reaffirmance of their reasonableness. *Alabama* v. *U.S.*, 283 U.S. 776; *U.S.* v. *Louisiana*, 78 L.Ed. 50; *Georgia Comm.* v. *U.S.*, 283 U.S. 765. In the cases just named the Commission's first order operated only upon the interstate rates, and in none of them was there reopening as to the interstate rates when subsequently the Commission was called upon to take specific action with respect to the State rates. In the *Georgia Case*, it was urged that the fact that the case

was not reopened as to the reasonableness of the interstate level, to which the State rates were required to be raised, denied the appellant the right of full hearing, but this Court pointed out that before ever the interstate rates had been established in the carriers' tariffs there had been full hearing as to their reasonableness in which the appellants had participated and that no evidence was offered at the supplemental hearing to show that conditions had so changed as to require reconsideration of that issue.

In the present case the interstate rates were similarly established in the carriers' tariffs as reasonable rates. In addition, they were reconsidered in light of changed conditions brought to the Commission's attention, and were reaffirmed. Everything asked of the Commission by appellants was done except the one thing that it demand of the carriers the preparation and submission of the new and detailed cost studies. It is submitted that the Commission's refusal to do this, not only was not an abuse of its discretion, but was the only reasonable ruling in the premises, fully confirmed as such by the cost data and other evidence which was produced at the further hearings.

II

The Commission's order requiring that the State rates of interstate railroads within the switching district be increased to correspond with increases, established in their interstate rates was entered "to prevent the depletion of revenues of carriers subject to the Interstate Commerce Act" and in performance of the affirmative duty imposed on the Commission by Transportation Act, 1920, "To Fix Rates and Take Other Important Steps to Maintain an Adequate Railway Service"

The Act to Regulate Commerce, 1887, was designed principally to put an end to discrimination in railroad rates and service as between shippers and to prevent the charging of excessive rates. Its only provisions prior to 1920 "that enured to the benefit of the carriers were the requirements that rates should be reasonable in the sense of furnishing adequate compensation for the particular service rendered and abolition of rebates." *Wisconsin R.R. Comm.* v. *C. B. & Q. R.R.*, 257 U.S. 563, 585. Transportation Act, 1920, introduced the new policy of promoting, through regulatory legislation, an adequate and efficient transportation service for the country. The provisions of said Act, and the relation of each to this great purpose, have been frequently discussed and explained in decisions of this court. "The most novel and most important feature" of the 1920 Act was section 15a requiring the Commission so to prescribe rates as to enable the carriers to earn a net railway operating income equal to a fair return on the value of railway property used in transportation. (Idem. 584.) This provision, and others in the 1920

Act, "imposed an affirmative duty on the * * * Commission to fix rates and take other important steps to maintain an adequate railway service for the people of the United States." [8] (Idem. 585.) The new Act aimed "to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden." *Dayton-Goose Creek Ry.* v. *U.S.*, 263 U.S. 456, 478. "The credit of the carriers, as a whole, had been seriously impaired. To preserve for the nation substantially the whole transportation system was deemed important. By many railroads funds were needed, not only for improvement and expansion of facilities, but for adequate maintenance. On some, continued operation would be impossible, unless additional revenues were procured." *New England Divisions Case*, 261 U.S. 189.

In addition to section 15a, other noteworthy provisions for the preserving of carrier revenue in the interest of an efficient transportation service were those empowering the Commission "to permit pooling of traffic and earnings; to fix minimum, as well as maximum rates; and thus prevent cut-throat competition and the taking away of traffic from weaker competitors; *to prevent the depletion of interstate*

[8] This affirmative duty has not been changed by amendment made in section 15a by Emergency Transportation Act 1920 (48 Stat. 211). "On the contrary, the substituted rule of rate making by its express terms emphasizes the carriers' need of adequate revenues." *State of Florida et al.* v. *United States et al.*, decided by this Court April 2, 1933.

revenues by discriminating intrastate rates * * *." *New England Divisions Case*, 261 U.S. 184, footnote, page 190. (Italics ours.)

The provision last referred to (Section 13 (3) and (4)) is the one directly involved in this case. It provides in part (Text in Appendix) that:

> Whenever * * * the Commission, after full hearing, finds that any such rate, fare, * * * or practice (imposed by State authority) causes any undue * * * preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, *or any * * * unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful*, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such * * * discrimination * * *.

Prior to the enactment of the above the Commission, acting under section 3, had in several cases found that State rates unduly preferred state shippers to the prejudice of interstate shippers, and had entered cease and desist orders. *Shreveport Case*, 234 U.S. 342. But there was then no prohibition in the Act against "unjust discrimination against interstate commerce" in the sense of State rates that fail to bear their just share of the burden of maintaining the carriers' revenues and the national transportation system. And

there was then no power in the Commission to act directly on the State rates by prescribing the rates to remove the discrimination.

Following Transportation Act, 1920, which, among other things, terminated federal control, the carriers applied to the Commission for authority to make general increases in all rates and fares. In its decision on the application, *Increased Rates, 1920*, 58 I.C.C. 220, 246, the Commission authorized substantial increases in freight rates and passenger fares. Some of the State rate regulating bodies denied applications of the carriers for authority to make like increases, whereupon the carriers invoked the Commission's jurisdiction under section 13 (4), above quoted. Several of the Commission's orders, entered in the proceedings which followed, were attacked in the courts and in each case which reached this Court, the Commission's order was upheld. *Wisconsin R.R. Comm. Case, supra; New York* v. *United States*, 257 U.S. 591; *N. C. & St. L. Ry.* v. *Tennessee*, 262 U.S. 318; *North Dakota* v. *C. & N. W. Ry.*, 257 U.S. 485.

Recent decisions of this Court have continued to emphasize the necessity that intrastate traffic contributes its just share toward the cost of maintaining the national transportation system.

In *Florida* v. *United States*, 282 U.S. 194, it was said at page 211:

> * * * As intrastate rates and the income from them must play a most important part in maintaining such a system, the effective operation of the act requires that intrastate

> traffic should pay "a fair proportionate share" of the cost of maintenance. * * *

In *Louisiana Comm.* v. *Tex. & N. O. R.R. et al.*, 284 U.S. 125, this Court said at page 131:

> * * * and it (Congress) has empowered the Interstate Commerce Commission * * * to require the carriers to make and apply on intrastate traffic such reasonable charges as will produce its fair share of the amounts needed to pay operating expenses, provide an adequate railway system and yield a reasonable rate of return on the value of the property used in the transportation service.

In *Florida* v. *United States*, decided April 2, 1934, this Court, speaking of the 1933 amendment to section 15a (48 Stat. 211), said:

> Neither the elimination of the group method of rate making, nor the substituted rule, suggests an intention to impair the Commission's authority over intrastate rates for the appropriate protection of interstate commerce. * * * The new Act discloses no intention to weaken national control for essential national purposes over the railway system of the country. It was rather designed to aid that control in the light of the depressed economic condition of the railways. We conclude that the new rule of rate making left the power of the Commission under Section 13 (4) intact.

III

The Commission's findings in support of the order as one to remove unjust discrimination against interstate commerce were adequate

It has been shown earlier in this brief that the rates for interstate switching within the Chicago switching district, as found reasonable in the Commission's first report, as established in the carriers' tariffs, effective December 10, 1931, as reconsidered in the light changed conditions brought to the Commission's attention at the further hearings and as reaffirmed in the second report, constituted a valid basis of reasonable rates for use by the Commission in reaching its determination that the lower rates for intrastate switching within the district subjected interstate commerce to unjust discrimination.

In the consideration of this case, there must always be in mind the fact that the Chicago switching district is essentially a unit so far as switching movements are concerned. Intrastate and interstate traffic are commingled in the switching movements and handled indiscriminately.

In its first report the Commission recited the rate history of the Chicago district showing that the Lowrey basis of rates had been adopted by concerted action of shippers and carriers, that it was a natural development in the interest of all concerned, and that shippers and carriers were practically unanimous in their desire for a uniform basis, the question of the level of the rate basis being the matter for adjustment. In its second report, the Commission, in

addition to reaffirming the reasonableness of the rates prescribed in its first report, dealt specifically with the unjust discrimination caused by the lower basis of intrastate rates; such discrimination being concretely shown by reason of the fact that the latter rates were continued at the lower basis for a considerable period after the interstate rates had been raised.

Although, at the time of its first report, the Commission issued no order with respect to the intrastate rates, it expressed the hope that the State Commissions would allow adjustment of the State rates in harmony with the conclusions in the report. At page 711, it said:

> A large percentage of the traffic under consideration is intrastate in character, but the record does not disclose any difference in the conditions surrounding the handling of the interstate and intrastate movements. In the hope that both the Illinois Commerce Commission and the Public Service Commission of Indiana will bring their rates in harmony with the conclusions herein, no specific finding or order with regard to intrastate rates will be entered at this time. (R. 75.)

In its second report, after stating at length facts of record evidencing discrimination caused by the failure of the two State commissions to permit establishment of the rates found reasonable for interstate movements, the Commission set forth its finding of discrimination as follows:

> We further find that the transportation conditions throughout the Chicago switching

> district are substantially similar; that they are not more favorable for intrastate movements than for interstate movements between the switching district and Chicago Heights; that the maintenance of intrastate switching rates and carload minimum weights in Illinois and Indiana between points within the Chicago switching district for 1-line, 2-line, and 3-or-more-line movements, and between that district and Chicago Heights on a lower basis than the corresponding all-commodity rates and minimum weights for 1-line, 2-line, and 3-or-more-line movements, found not unreasonable and approved for interstate transportation in switching service, has not been shown to have caused or to cause any undue preference and advantage of persons or localities in interstate commerce, or any undue prejudice and disadvantage to persons or localities in interstate commerce, but that the maintenance of such lower intrastate rates results, and will for the future result in unjust discrimination against interstate commerce. (R. 166.)

Appellants cite *Florida* v. *United States*, 282 U.S. 194, to support their contention that the report in the instant case lacks the findings necessary to support the order as one to remove a revenue burden. But the findings which were absent in the *Florida Case* are present in this case. At page 116 the Commission's second report reads:

> The carriers show a constructive annual loss in revenue resulting from the lower intrastate rates required to be maintained under the

orders of the Illinois and Indiana State Commissions. This loss is measured by the difference between the revenue which would have accrued on the intrastate traffic of September 1926 under interstate rates as increased December 10, 1931, and the prevailing intrastate rates. The traffic moving in September 1926 is used as representative because it was the basis for the cost data presented in the original case. The estimated annual difference in revenue within Illinois amounts to $2,683,981, within Indiana $94,244, and between the Chicago switching district and Chicago Heights $86,732, a total of $2, 864, 957, which the carriers contend is the amount by which interstate commerce would be unduly burdened under normal business conditions. Studies also were made of the difference in revenue between the interstate and intrastate rates based on the traffic moving during the weeks of November 9 to 15, 1931, and January 11 to 17, 1932. These two weeks represent periods prior and subsequent to the December 10, 1931, interstate increases. Based on the intrastate switching traffic moving within the district for the week of November 9 to 15 there is shown a difference in revenue of $11,731 per week, or an estimated annual loss of $1,011,369; on the basis of the traffic for January 11 to 17 the difference would amount to $9,556 per week, or an estimated annual loss of $985,181. Based on the traffic which moved intrastate between the district and Chicago Heights for the week of November 9 to 15 the difference in revenue would amount

> to $535, or an estimated annual loss of $46,152; and for the period January 11 to 17 there is shown a loss of $562, or a net annual loss of $57,979. These constructive differences amount annually to $1,057,521 based on the traffic handled during the week of November 9 to 15, and to $1,043,160 based on the traffic moving during the period January 11 to 17. (R. 164.)

Summing up the above it will be seen that as based on traffic conditions of 1926, that is, prior to the business depression and asserted as representing normal conditions, the loss is shown as $2,864,957 annually. The other estimates, based on traffic representative of 1931 and 1932 conditions, show a constructive annual loss of $1,057,521.

After setting forth the carriers' estimated losses, the report states that in those estimates the carriers relied on the assumption that all the traffic would continue to move at the higher rates, which was not a fair assumption. (R. 165.) In this connection the Commission pointed out that while the major part of the tonnage decrease since 1926 had been due to business depression, a part was due to diversion to motor trucks. The report then reads:

> * * * Within the Chicago switching district there are many improved highways and also certain navigable waterways which handle a substantial volume of tonnage that otherwise would move by rail. The witnesses for certain industries testified that any increases in the present intrastate rates on

> their commodities, which included pig iron, paving and roofing tar, sulphuric acid and other chemicals, crushed stone, and others, would divert the tonnage to motor trucks, pipe lines, or barges. However, having in mind that the average single-line intrastate haul in Illinois is nearly 15 miles and in Indiana 6.3 miles; that highway traffic conditions in the Chicago district are congested, involving material delays in the movements of trucks; that the differences between the intrastate and interstate rates at present are generally for single-line hauls only $1.50, and $3 after expiration of the emergency increases; and also that a very large proportion of the intrastate traffic is handled in 1-line movements, we are not convinced that any substantial proportion of the traffic now moving by rail intrastate will be diverted to other forms of transportation if the rates found reasonable for interstate traffic are applied thereto. (R. 165.)

The report thereafter quotes that part of this Court's decision in the *Florida Case* where, among other things, it is said that the raising of rates may not increase revenues because discouraging patronage, and that the Commission should have made findings "as to the revenue which had been derived by the carrier from the traffic in question, or which could reasonably be expected under the increased rates, or that the alteration of the intrastate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden." Directly

following this the report makes the express finding that—

> While the evidence shows that the existing competition by motor truck is material, and indicates that this means of transportation will be utilized to a greater extent if the intrastate rates are increased, and that therefore, some additional tonnage in all probability will be lost to trucks, or diverted to barge and pipeline movement, the record nevertheless is convincing that the carriers will derive a substantial increase in revenue if the intrastate rates are increased to the interstate basis, and we so find. (R. 166.)

Following the above the Commission made its formal finding of unjust discrimination against interstate commerce, which finding is set forth in full earlier in this chapter.

It will be seen that, while the Commission was unable to give full effect to revenue losses claimed by the carriers, neither was it "convinced that any substantial proportion will be diverted to other forms of transportation if the rates found reasonable for interstate traffic are applied to intrastate traffic." Giving full consideration to appellants' evidence of competitive conditions the Commission, nevertheless, believed that the carriers would derive a substantial increase in revenue from the increased rates; and it so found.

It is not expected of the Commission that it make findings of impracticable exactness. Reasonable determinations depending upon the circumstances of

the case are all that are required. *Florida* v. *United States, supra*. *Florida* v. *United States*, decided April 2, 1934; *Louisiana* v. *United States*, 284 U.S. 125; *Wisconsin R.R. Com.* v. *C. B. & Q. R. Co.*, 257 U.S. 563; *Georgia* v. *U.S.* 283 U.S. 765; *Alabama* v. *U.S.* 776.

IV

There was abundant evidence in support of the Commission's finding of unjust discrimination

The conditions which made necessary the adoption generally throughout the Chicago switching district of a switching basis of rates developed naturally and, since the district is one homogeneous whole, may be said to obtain with respect to all intradistrict switching whether or not the particular movement crosses the Indiana-Illinois State line. The Commission's first report points out that the district is larger than any other switching district in the country and is densely populated; that 35 railroads operate within it which maintain a network of over 5,000 miles of track, serving over 4,000 private industries (R. 39, 40); and that the chaotic condition prior to 1911, due to lack of uniformity of rates and practices, gave rise to a concerted effort by shippers and carriers to secure uniformity, which resulted in the adoption generally throughout the district of the Lowrey tariff of uniform rates applying, with some exceptions, on all commodities and irrespective of distances. (R. 40.) In Appendix C to the first report (R. 78–82) there is set forth an analysis of tonnage moving on the Lowrey basis and on exceptions to that basis, divided as to 1;

2 and 3-or-more-line hauls, and as between interstate and intrastate movements. The report also contains discussion (R. 56–70) with respect to particular commodities showing the extent of the movement interstate and intrastate and the physical, commercial and competitive circumstances under which the several commodities are moved. Keeping in mind that the interests of shippers and carriers in the maintaining of a switching (or group) basis of rates obtains throughout the whole district and irrespective of the State line, it will be understood that all the evidence discussed in the first report bears, not only on the reasonableness of the interstate rates prescribed, but also on the discriminatory and burdensome effect of maintaining a lower basis on switching movements not crossing the State line. The Commission's first report contains ample facts to support the conclusion there stated (R. 78) that "the record does not disclose any difference in the conditions surrounding the handling of the interstate and intrastate movements."

The second report contains (R. 156–166) a recital of specific facts relating to unjust discrimination, which facts are concrete because based on the actual effect of maintaining lower rates for intrastate than interstate switching movements within the district. It is there shown that the intrastate traffic (with exceptions, R. 157) moves on the so-called Lowrey basis, the same rate and minimum weight applying to each commodity irrespective of difference in the length of haul; that the evidence disclosed that the traffic, both interstate and intrastate, is handled in

the same train, by the same crews and in the same manner (R. 156–157); that many of the railroads cannot move traffic from an industry on the Indiana side to an Indiana destination without crossing the State line, and, likewise, must cross the State line in a movement from Illinois industries to destinations in that State; that some of the activities are located on both sides of the State line, and that some of the assembling yards and interchange tracks overlap State lines (R. 159); that while many industries can ship to points within its boundaries over only interstate routes and must, therefore, pay the higher interstate rates, many other industries have intrastate routes to which they resort to obtain the lower rates, although they are so-called unnatural routes against the flow of the traffic and therefore entailing additional expense in the handling. (R. 160.)

Appellants contend (Br. 36–39) that in view of the differences in the average lengths of haul between intrastate and interstate movements, the average costs of all traffic are not representative of the costs of intrastate traffic and hence it cannot be said that the lower intrastate rates for the shorter distances discriminate against interstate traffic. Answering the same contention the Commission said (R. 163–164):

> Switching charges differ from line-haul rates in that they are ordinarily not graded in accordance with either the value of the commodity moved or the distance of movement. As a rule they apply to any haul within the switching district no matter how long or how short it may be, subject to the qualification

> that a haul to or from a connecting line may take a lower charge than a haul complete in itself. *Boston Wool Trade Asso.* v. *Director General*, 69 I.C.C. 282, 294. Switching charges are largely based on average conditions.
>
> * * * * *
>
> Furthermore the intrastate hauls within the district range from a fraction of a mile to 54 miles, and there are interstate hauls also which range from a fraction of a mile to 68 miles, with one haul shown of approximately 89 miles. It thus follows that there are many individual interstate hauls which are longer than many of the interstate hauls. From the outset, as previously stated, the interested parties, with few exceptions, favored an all-commodity basis, and practically all parties were of one accord that one level of rates should apply throughout the district on both interstate and intrastate movements, but coupled generally with the proviso that the level of the rates should not exceed the intrastate basis.

In short, appellants' contentions based on differences in length of haul in effect repudiates what has been obtained by concerted action of shippers and carriers over a long period of years, namely, the all-commodity basis of rates applying generally for all distances throughout the district; and, if given effect, would bring about a reversal of the method pursued by railroads and rate-regulating bodies for many years in fixing switching rates in congested districts. In view of the testimony of record and repeated statements in the Commission's reports it is plain that

shippers generally, and whether in their capacity as interstate or intrastate shippers, do not want to discard the switching (or group) basis of rates, although preferring that that basis be fixed at the intrastate rather than the interstate level. But that is beyond the scope of this suit which involves only the intrastate order. The Lowrey basis of rates has been in the interest of both shippers and carriers and Chicago has benefited thereby,[9] industries being attracted to the district because the element of distance was eliminated from the switching charges and thus competitive industries were on an equality, so far as switching rates were concerned, regardless of their location within the switching district. Treating an area as a unit and applying uniform rates thereto is no new thing in rate making—"blanket territory" and "group rates" are common expressions, well known to this Court. *St. Louis S. W. Ry. Co.* v. *United States*, 245 *U.S.* 136, 138, and note 1, 141 and note 1; *United States* v. *Illinois Cent. R.R.*, 263 U.S. 515, 518, note 1; *Virginian Ry.* v. *United States*, 272 U.S. 658, 660, 664.

Many witnesses testified to the desirability of the all commodity basis of rates for all distances.[10] Railroad officials testified that distance did not "cut much figure" in the switching district and is not important in determining cost. (R. 977; 989; 992.) Classifica-

[9] Witness Beyers R. 767–774; Haynes R. 535.

[10] Witness Haynes, R. 535; Forrest, R. 565; Warner, R. 617; Shank, R. 653, 849; Newman, R. 655; Robert, R. 659; Adams, R. 709; Beyers, R. 768; 774; Galligan, R. 794, 799.

tion in the terminals or interchange yards enters more importantly into the costs (R. 1000; 996–997; 1174–1177). They also testified that the traffic, both interstate and intrastate, is handled in the same trains and in the same manner (R. 956–957; 965; 986; 996). The extent of the burden on the carriers' revenues resulting from the lower intrastate rates was set forth in the preceding chapter. It is shown in Exhibits Nos. 99A, 101A, 102A, 103A and 105A, which were introduced by the carriers. (R. 944–947, 1007 et seq.) Railroad officials also testified that shippers having available to them lower-rated intrastate routes made use of them in so-called unnatural movements against the flow of the traffic. (R. 964; 965–973; 1000–1002.) This is also brought out in exhibit 110, which shows that between December, 1931 to March 1932, 856 cars were moved over such routes which would have formerly moved over interstate routes. The increase in intrastate movements following the increase in interstate rates is also shown in table at page 114 of the second report (R. 114) and by Exhibit 105A.

V

Denial of appellants' motion for rehearing was not an abuse of discretion

Appellants assert that the Commission abused its discretion in refusing to reopen the proceedings and to set the case for further hearing as requested in their joint motion (R. 169), and because of that the order is void.

Most of the matters presented in support of the motion had been before the Commission on the record made in the hearings, and had been urged in oral argument and in briefs submitted. For example, it is urged that the order should be vacated and the proceedings reopened because of "changed conditions" since the record was closed. (R. 180.) The alleged changed conditions were that competition between the rail carriers and carriers engaged in transportation by truck, water or pipe line had greatly increased since the record had closed, May 10, 1932. But the matter of competitive conditions had been considered by the Commission in its second report, as has already been shown. The motion for reopening and rehearing merely asserts a greater degree of competition. Compare *United States* v. *Northern Pac. Ry.*, 288 U.S. 490, 494.

It was also urged that the order was void because new cost studies had not been required of the carriers. This same contention was made in appellants' motion asking the Commission to require the carriers to make such new studies for the second hearings, and has been fully considered in Chapter I of this brief.

VI

The order is not indefinite

Appellants contend (Br. 105) that the Commission's order is indefinite in its operation upon carriers which "have no rails in the district" except in the Illinois part thereof. In this connection they men-

tion that the Commission's first order prescribed interstate rates of 3 cents for one-line hauls, 3.5 cents for two-line hauls and 4 cents for three-or-more line hauls, and that its second order required the carriers to establish intrastate rates not less than the rates contemporaneously applied by them in interstate switching service. The point which appellants seek to make is that, since a one-line haul is a haul of a single carrier, an interstate one-line haul in intra-district switching is a haul of a single carrier over its own rails across the Illinois-Indiana State line. From this they argue that the requirement of the Commission's order for the increasing of one-line intrastate rates to the one-line interstate level is indefinite, in that those carriers whose hauls over their own rails (one-line hauls) do not cross the State line do not have in their own tariffs the one-line interstate rate of 3 cents which the Commission's second order prescribes also as the level for one-line intrastate rates.

On the face of the order the requirement for increase in intrastate one-line rates plainly is not limited to the carriers which operate with their own rails across the Illinois-Indiana State line. Moreover, an order of the Commission must be read together with the report of which it is a part. *Georgia Comm.* v. *United States, supra*, p. 771; *American Express Co.* v. *Caldwell*, 244 U.S. 617, 627. And when the present order is so read there is no conceivable room for dispute as to its requirements for increase intrastate for one-line,

two-line, and three-or-more line hauls to the interstate level of 3 cents, 3.5 cents, and 4 cents, respectively. This is so plain from the whole report that it is shown at its beginning in the statement of the issues, namely, the increases proposed intrastate, by practically all discussion of evidence bearing on the proposed increases and by the reports' findings and conclusions.

In connection with their contention that the order is indefinite in its application to carriers which do not, with their own rails, operate across the Illinois-Indiana State line, appellants refer to *Texas & Pacific Ry.* v. *U.S.*, 289 U.S. 627, wherein it was held that, in order to constitute discrimination within the purview of section 3 of the Act, there must be a common control and responsibility for both the prejudicial and preferential rates. Appellants' contention, as based on this case, is best shown by the statement in their brief which reads as follows (p. 107):

> The observance of the principle of law enunciated in that decision presumably explains the indefiniteness of the order complained of. The Commission was well aware that, in requiring the removal of unjust discrimination, it could not enter a valid order unless the carrier which maintained and charged the rate found to be unjustly discriminatory against interstate commerce likewise maintained and charged the rate alleged to unjustly discriminate in favor of intrastate commerce.

> The Commission consequently took care to enter an order which in form does not contravene the principle enunciated in the *Texas & Pacific Case*.

But the rule of the *Texas & Pacific Case* that there must be common control and responsibility for both the prejudicial and preferential rates in a case under section 3 has no application in a case under section 13 (4) where the Interstate Commission has adjudicated the reasonable level of interstate rates and the carriers are only nominal defendants since they are petitioning for an order prescribing the same rates for intrastate service. In such case the real source of responsibility for the preference and discrimination is not in any carrier or carriers but in the State. And the Interstate Commission is expressly authorized to prescribe the State rates which will remove such character of preference and discrimination.

Particularly in a case such as this of unjust discrimination against interstate commerce growing out of revenue losses from low and burdensome intrastate rates the section 3 principle contended for by appellants is utterly irrelevant. Clearly, the purpose of section 13 (4) to relieve interstate commerce and interstate carriers from such burdensome State rates does not depend upon whether or not each and every of the carriers involved is engaged in precisely the same kind of haul interstate as intrastate.

CONCLUSION

It is respectfully insisted that the decision of the lower court should be sustained and the bill dismissed.

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APPENDIX

Pertinent in the consideration of the case are the following provisions of the Interstate Commerce Act (U.S. Code, Tit. 49):

Section 1 (5):

> All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: * * *

Section 13 (2):

> Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been

appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Section 13 (3):

Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making

authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

Section 13 (4):

Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classifications, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

Section 16 (a):

> That after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. * * *

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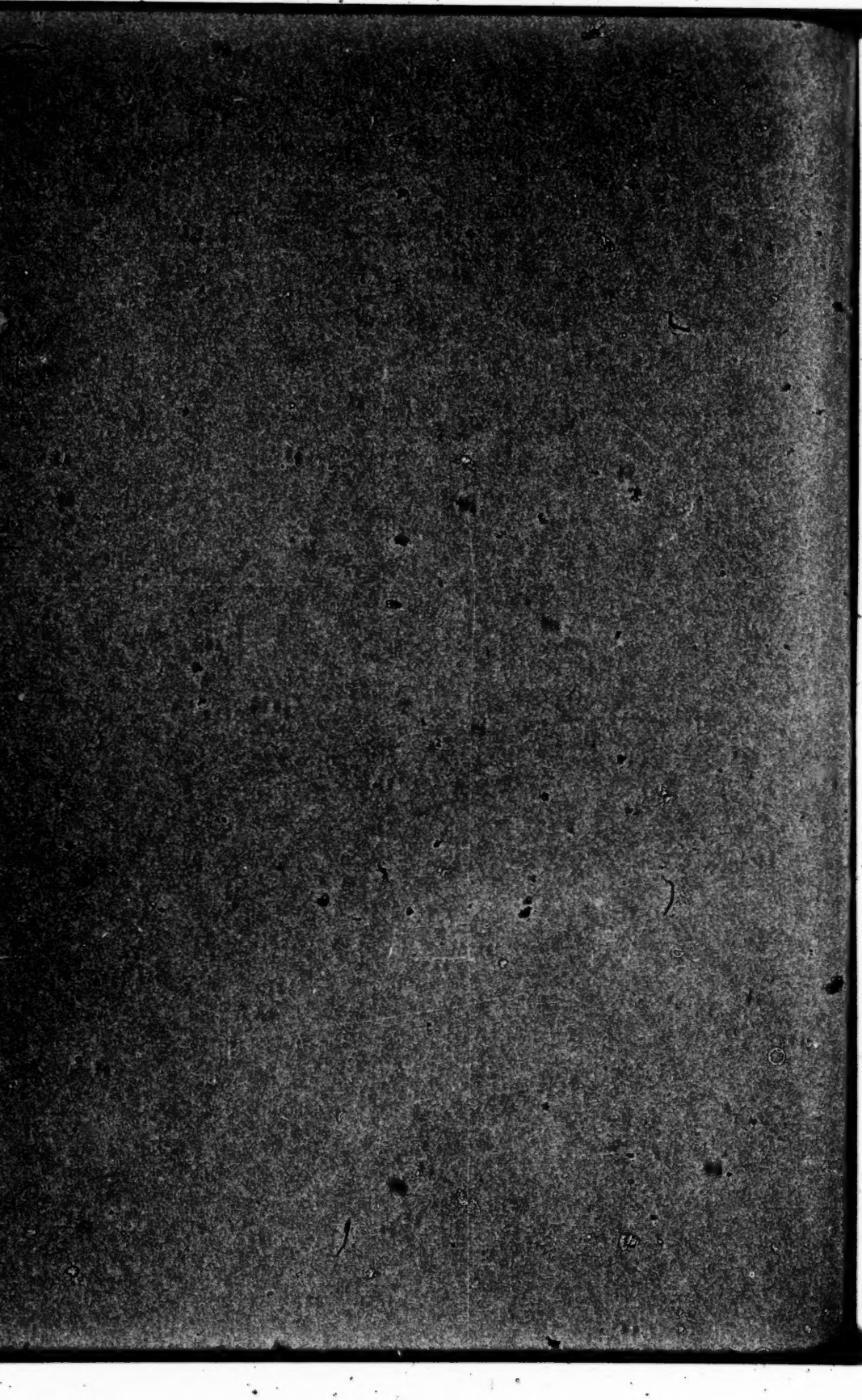

SUPREME COURT OF THE UNITED STATES.

No. 787.—October Term, 1933.

Illinois Commerce Commission, Public Service Commission (of Indiana), Board of Trade of the City of Chicago, and Acme Steel Company, Appellants, *vs.* The United States of America, the Alton Railroad Company, the Atchison, Topeka and Santa Fe Railway Company.	Appeal from the District Court of the United States for the Northern District of Illinois.

[May 28, 1934.]

Mr. Justice Stone delivered the opinion of the Court.

This is an appeal under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220, from a decree of a District Court for Northern Illinois, three judges sitting, which dismissed the complaint upon which appellants sought to set aside an order of the Interstate Commerce Commission, — Fed. Sup. —.

The order, made under § 13 (3) (4) of the Interstate Commerce Act, directed the removal of unjust discrimination against interstate commerce, resulting from disparity of the intrastate and interstate switching rates of interstate rail carriers in the Chicago Switching District, lying partly in Illinois and partly in Indiana. It provided that the intrastate rate should be not less than the interstate switching rates prescribed in an earlier order of the Commission in *Switching Rates in the Chicago Switching District*, 177 I. C. C. 69, of 3¢ per 100 lbs. for one-line hauls, 3.5¢ for two-line hauls, and 4¢ for three-or-more-line hauls, of carloads of minimum weight of 60,000 lbs. The rates, both interstate and intrastate, which were thus displaced were commodity rates of 2.5¢ per 100 lbs. for one and two-line hauls, and 3¢ for three-or-more-line hauls. The rates are for district intrastate switching movements, having no relation to main line movements. They are chiefly between local industries, involve a complete service originating and

terminating within the district, and embrace a loaded and empty car movement and two complete terminal services.

The Commission, of its own motion, began the first proceeding in *Switching Rates in the Chicago Switching District, supra,* in which the carriers, interested shippers, and the state commissions of Illinois and Indiana were parties, and in the course of which extensive hearings were conducted jointly by the Interstate Commerce Commission and the two state commissions. Pending this proceeding, the carriers were directed by the Interstate Commerce Commission to make a cost study of switching movements in the District. This study, which involved the preparation of statistics showing the longest, shortest and average hauls within the District and detailed cost data for selected periods in 1926-1927, was completed and submitted to the Commission and was an important part of the evidence on which it based its decision.

In its report and order, made July 31, 1931, the Commission found the rates which it prescribed for interstate switching service to be reasonable for future application on all commodities shipped within the District, except railway equipment on its own wheels. It also stated that a large percentage of the traffic was intrastate in character, but that the record did not disclose any difference in the conditions surrounding the handling of the interstate and intrastate movements. It made no order with respect to the intrastate traffic, but expressed the hope that the two state commissions would bring the intrastate rates into harmony with the interstate rates which it had prescribed.

The state commissions failed to prescribe a higher level of intrastate rates, and the carriers of the District, shortly after the new rates became effective, filed with the Interstate Commerce Commission a petition to establish an increased rate for intrastate traffic, whereupon the Commission, on November 2, 1931, reopened the proceeding for further hearing with respect to the relationship of intrastate and interstate rates. A complaint filed with the Commission by numerous shippers attacking the lawfulness of the interstate switching rates was assigned for hearing with the proceeding already pending.

At the hearings, the state commissions in one proceeding and the shippers in the other offered evidence which, by stipulation, was treated as received in both, to show that the interstate switching

rates were unreasonably high, and in support of allegations that the cost study made in the first proceeding was defective because of changed conditions. The Commission consolidated the two dockets in one report, and by its report and order of July 3, 1933, 195 I. C. C., assailed here, it dismissed the complaint of the shippers with respect to the interstate rates and placed the intrastate rates on the same basis as the interstate rates already in effect. Before the hearings were closed motions of the state commissions and shippers, appellants here, that a further and more detailed cost study be made, which it was contended would be more representative of the traffic, and which would reflect conditions in 1932, five years after the period selected for study, were denied. The same questions were raised by motions to reopen the proceedings in the two dockets, or for reargument, to reconsider the cost study, which were also denied.

In the District Court below the case was submitted upon the pleadings, the two reports and orders of the Commission, and certified copies of the evidence and exhibits before the Commission in the second proceeding. The court dismissed the complaint upon findings of fact and law, rejecting the several contentions which appellants make before us.

The scope and application of § 13 (4) have so recently been fully considered in opinions of this Court in *United States* v. *Louisiana*, 290 U. S. 70; *Florida* v. *United States*, No. 349, decided April 2, 1934; see also *Georgia Public Service Commission* v. *United States*, 283 U. S. 765; *Florida* v. *United States*, 282 U. S. 194; that it is unnecessary to repeat that discussion here. Under § 13 (4) of the Interstate Commerce Act, the Interstate Commerce Commission is given plenary power to remove the discrimination created by intrastate rates against interstate commerce, by raising intrastate rates so that the intrastate traffic may produce its fair share of the revenue required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service. The question for decision is whether the order of the Commission directing the removal of the discrimination is supported by the findings, based upon substantial evidence.

The numerous objections to the order are grounded for the most part on an elaborate analysis and discussion of the evidence. All have received our attention, but so far as they require our discussion they may be summarized as follows: (1) The order of the